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438773—57

In the Supreme Court of the United States

OCTOBER TERM, 1957

WM. H. WISE COMPANY, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. 1a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1957 (Pet. 2a), and the petition for certiorari was filed on August 16, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The Federal Trade Commission found that petitioners had misrepresented that a collection agency which they controlled and used to collect their debts was "separate and independent," and entered a cease-and-desist order. The following questions are presented:

1. Whether the Commission was warranted in finding that its proceeding was in the public interest.

2. Whether petitioners' collection methods constituted unfair or deceptive acts or practices under the Federal Trade Commission Act.

3. Whether it was proper for the Commission's order to extend to petitioners' "agents, representatives and employees."

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 52 Stat. 111, 66 Stat. 632, 15 U. S. C. 45, provides in part as follows:

> Section 5 (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint * * *.
>
> * * * * *

STATEMENT

After full administrative proceedings, the Federal Trade Commission found that petitioners had engaged

in unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act, and entered a cease-and-desist order. The Court of Appeals for the District of Columbia Circuit unanimously affirmed the order *per curiam*.

The pertinent facts, as found by the Examiner and adopted by the Commission (J. A. 49),[1] are as follows:[2]

The corporate petitioners are engaged in the sale and distribution of various products in commerce, including a course of instruction in beauty care (J. A. 37–38, 42). Petitioner Crawley is president of the companies and formulates, controls and manages all their policies (J. A. 38). Crawley also owns and operates, under the name of "Publishers Protective Service," a collection business. All of the employees of the collection business are employees of one of the corporate petitioners (J. A. 38, 43–44); its mailing address is a post office box in Grand Central Station, New York City; and it is listed on the office bulletin board of the building where the corporate petitioners have their offices (J. A. 42–43).

Although Publishers Protective Service formerly made collections for outside companies, in "recent years" it has been used "exclusively" for the collection of the corporate petitioners' accounts (J. A. 39).

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[1] "J. A." refers to the Joint Appendix in the court of appeals, copies of which were filed with the petition.

[2] The Commission's complaint (J. A. 7–14) charged petitioners with various unfair and deceptive practices. All but one of these charges were settled before hearing through entry of a consent cease-and-desist order (J. A. 16–19).

Petitioners use the following procedure in collecting delinquent accounts: A series of letters, "of varying degrees of friendliness," are sent to delinquent debtors (J. A. 43). These include notices on the letterhead of one of the corporate petitioners "advising that if payment were not made, the account would be placed with a 'collection agency' or 'an outside department for collection'"—a step described as "about as unpleasant a thing as we can think of" (J. A. 43). If these letters failed to induce payment, petitioners then sent the following letter, under the name and masthead of "Publishers Protective Service" (J. A. 28–29, 43–44, emphasis in original):

PUBLISHERS PROTECTIVE SERVICE

CREDIT INVESTIGATIONS AND COLLECTIONS OF DELINQUENT ACCOUNTS

Department of Investigations

NOTICE:

A duplicate statement of your account is enclosed herewith. We have been instructed to take any necessary steps to effect collection.

Our clients state that some time ago you entered into a definite agreement to make regular monthly payments for merchandise which they furnished you in good faith but that you still owe them the long overdue amount shown.

Our clients further state that you have been given every opportunity to pay this honest debt. They are convinced that you do not intend to pay unless you are sued in court. They are planning on retaining counsel to handle this case for them.

Before we proceed further, we are going to get up-to-date information on you, including your *exact present address*, your *place of employment, amount of salary,* and *amount of your real and personal property.* Do you know that court costs, interest charges, and attorney fees must be paid by the person against whom judgment is rendered? Legal action against you may result in considerable additional expense to you. If you doubt this statement, we suggest that you consult your attorney.

In order that you may avoid unnecessary publicity and expense, we urge you to send your payment today in the enclosed envelope.

Very truly yours,

PUBLISHERS PROTECTIVE SERVICE,

(S) J. M. LAHY, *Manager.*

The Commission held (J. A. 49) that a debtor receiving such a letter "would be led most naturally to believe that his account had been handed over for collection to an entirely independent collection agency" (J. A. 30); that the "most reasonable inferences" were that petitioners had used such letters "for the express purpose of so deceiving and misleading the debtors who received such letters and to constrain them to pay by coercion and intimidation" (*ibid.*); that the proceeding was in the public interest since "many thousands" of these deceptive Publishers Protective Service letters were sent out annually, and that it would be "economically unfeasible, and in most cases impossible" for a debtor owing $2 or $4 to investigate and discover that he was still receiving collection letters from his creditor and not an independent collection agency (J. A. 31–32); that Publishers Pro-

tective Service "is not a 'bona fide' collection agency but is a 'fictitious' one" (J. A. 39, 44); and that petitioners' representations that it is a "separate and independent collection agency" "have tended to mislead and deceive the public" (J. A. 39, 46).

ARGUMENT

1. Petitioners contend (Pet. 7–10) that the Commission proceeding was not in the public interest, and that the Commission therefore had no jurisdiction to proceed against them. It is well settled, however, that "it is in the public interest to require that creditors should not use dishonest methods in collecting their debts * * *" (*DeJay Stores, Inc.* v. *Federal Trade Commission*, 200 F. 2d 865, 867 (C. A. 2)), and that "[t]he fact that acts and methods deemed deceptive are used to trap delinquent debtors does not prevent such acts and methods from being against the public interest." *Rothschild* v. *Federal Trade Commission*, 200 F. 2d 39, 42–43 (C. A. 7). See also *Bennett* v. *Federal Trade Commission*, 200 F. 2d 362 (C. A. D. C.); *Silverman* v. *Federal Trade Commission*, 145 F. 2d 751 (C. A. 9). In the instant case, as the Commission found (J. A. 31–32), "many thousands" of petitioners' deceptive collection letters are sent out every year, and their recipients could not feasibly determine that it was their creditor, and not an independent collection agency, that was pressing for payment. Debtors receiving such letters would anticipate that non-payment would be followed by the usual "vigorous methods generally adopted by collection agencies" (J. A. 46) and therefore might be coerced and intimidated into paying (J. A. 30). The

practice thus is "so serious and widespread as to make the matter one of public consequence." See *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 28. Compare also, *American Airlines* v. *North American Airlines*, 351 U. S. 79, 83. As the Commission pointed out (J. A. 48), the duty of persons to pay their just debts "does not, however, justify [collection] methods that are deceptive under the law."

2. Petitioners next contend (Pet. 10–14) that their collection practices are not deceptive. They argue (Pet. 10–11) that Publishers Protective Service is not, as the Commission found (J. A. 39, 44), a "fictitious collection agency," but is a "bona fide one, separate and distinct from the other Petitioners," registered as a collection agency under New York law, and collecting "lawful, just and demandable" debts. But the fact that a collection agency is registered under state law, or that the debts are bona fide, is immaterial in determining whether the collection *methods* employed constitute unfair and deceptive acts and practices under the Federal Trade Commission Act. Here petitioners' entire course of conduct obviously was designed to make the debtors believe that Publishers Protective Service was an independent collection agency, whereas the Commission found (J. A. 44–45) that "[i]t does not exist for its own independent purposes but only for the purposes of respondent [petitioner] corporations." Cf. *International Art Co.* v. *Federal Trade Commission*, 109 F. 2d 393, 395–396 (C. A. 7). As the examiner pointed out (J. A. 36–37), "[n]o good reason appears as to why any legitimate creditor should resort to con-

cealing his real identity by using collection letters of the type used in this case."

Contrary to petitioners' contention (Pet. 12–14), the Commission's order does not impose upon them any "duty to disclose to debtors any identity of ownership or control between the creditor and the collection agency * * *." It merely prohibits them from "[u]sing fictitiously any trade or corporate name in collecting past-due accounts," or "[i]mplying that such fictitious collection agency is an independent organization engaged in the business of collecting" such accounts (J. A. 40, 49).

3. Finally, petitioners challenge the order because it extends to their "agents, representatives and employees [none of whom was a respondent in the Commission proceedings], directly or through any corporate or other device" (Pet. 14–15). Commission orders typically include like or similar provisions, and we submit that the incorporation of these words in the instant order was proper.

In *Regal Knitwear Co.* v. *National Labor Relations Board,* 324 U. S. 9, this Court upheld a Labor Board order which extended to a company's "officers, agents, successors and assigns." In holding that the court of

appeals properly had refused to delete the words "successors and assigns," the Court noted (p. 12) that various regulatory agencies, including the Trade Commission, have "issued orders containing these familiar provisions," and that the courts of appeals have "generally enforced orders containing this provision." Pointing out that "[n]o concrete case is before us," but only "an abstract controversy over the use of these words," which "is as sterile as abstract controversies usually are" (p. 15), the Court refused to "hold abstractly that this provision is an illegal one to include in a cease and desist order of the Labor Board or an enforcement order of the Court" (p. 16). It ruled (*ibid.*) that "[w]e cannot say" that a provision covering " 'successors and assigns' as well as 'officers and agents' " is not "permissible."

Similar reasoning supports the action of the court of appeals in the instant case in upholding the order as written. Indeed, the provision here ("agents, representatives and employees") is narrower than that upheld in *Regal Knitwear*.[3] The provision was particularly appropriate in this case, since the deception consisted of representing that a firm controlled by petitioners was independent.

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[3] To whatever extent *R. J. Reynolds Tobacco Co.* v. *Federal Trade Commission* 192 F. 2d 535, 539 (C. A. 7), upon which petitioners rely (Pet. 14–15), reached a contrary result, it appears inconsistent with *Regal Knitwear*.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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